No. 11381

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

(Second of such Briefs.)

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Statutes and Regulations Involved.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Section 4 of the Emergency Price Control Act of 1942 (50 U. S. C. App. 904) provides in part as follows:

> "It shall be unlawful, regardless of any contract, agreement * * * or other obligation heretofore or hereafter entered into, for any person to sell or

deliver any commodity, * * * or otherwise do or omit to do any act, in violation of any regulation or order * * * of any price schedule effective in accordance with the provisions of this Act."

Section 202(b) of the Emergency Price Control Act of 1942 (50 U. S. C. 922(b)) provides as follows:

"The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, * * * to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, * * *."

Section 205(b) of the Emergency Price Control Act of 1942 (50 U. S. C. 925) provides for penalties for violation or for "Enforcement."

NOTE: 1946 Edition, United States Code, Title 50, Section 946 (Appendix), "Short Title," omits the use of the phrase "as amended." We quote:

"§946. Short title.

"This Act [sections 901-922 and 923-946 of this Appendix] may be cited as the 'Emergency Price Control Act of 1942.' (Jan. 30, 1942, ch. 26, title III, §306, 56 Stat. 37.)"

The Act as initially enacted on January 30, 1942, Stat. 23, is termed "Emergency Price Control Act of 1942." This Act was amended from time to time; however, the amendments primarily dealt with the substitution of a new termination date, *i. e.*, 50 U. S. C. 901(b). Initially, the Act was to have terminated June 30, 1943. The termination date was then advanced to June 30, 1944; thereafter, to June 30, 1945; later, to June 30, 1946; and, finally, to

June 30, 1947. Further reference to the statutes pertaining to such amendments will be noted directly following Section 901, Title 50, U. S. Code.

Maximum Price Regulations 148, 169 and 239 are the Regulations of the Office of Price Administration making detailed provisions with reference to meat products of the type involved in this case.

Regulation 169, and as revised, dealing with the wholesale of meat and veal, particularly applies to this case. A portion of such R. M. P. R. No. 169 is set forth in the appendix to this brief (7 Fed. Reg. 10381, as Amended, issued Dec. 10, 1942, effective Dec. 16, 1942).

Statement of Facts.

The indictment in this case consisted of fifty counts. The appellants, Stillman and Segal, were both found guilty of the same counts, namely, twenty-three in number. For reasons unimportant to this appeal the other counts were dismissed.

Briefly stated, appellants Segal and Stillman were partners, engaged in the wholesale of meat. The evidence indicated that merchants purchasing meat from the appellants were compelled to pay in excess of the ceiling price. This excess of from one to eight cents per pound above the ceiling was paid to appellants or their employees in the form of cash. Such merchants were billed at the ceiling rate but made side payments to the appellants. The records, or invoices, issued by appellants reflect the ceiling or correct price allowed to be charged. They of course omitted the excess collected on the side. The appellants did not take the stand nor offer any affirmative defense.

The first count charged a conspiracy to violate the Emergency Price Control Act of 1942, 50 U. S. C. App. Sec. 901 *et seq.* The conspiracy count referred to certain Revised Maximum Price Regulations pertaining to the sale of meat, the most important of which is Regulation 169, pertaining to beef and veal. The remaining counts of the indictment charge substantive offenses of two types, *i. e.,* in excess of the legal maximum price allowed and falsification of entries and documents required to be kept under the provisions of the Emergency Price Control Act and Regulations. The substantive counts were likewise predicated upon 50 U. S. C. App., Sec. 901 *et seq.*

The counts on which both appellants were found guilty are identified as follows:

Count 1—Conspiracy count (from July 1, 1943, to March 11, 1946).

The counts charging over-ceiling sales are the following:

Counts 2, 3, 4, 5, 6, 45, 46, 47, 48, 49 and 50. (These offenses are charged to have occurred at specific dates from about August, 1944, through March, 1945.)

The counts charging false entries or falsification of records, of which appellants were found guilty, are Counts 12, 13, 32, 37, 38, 39, 40, 41, 42, 43 and 44. (These offenses likewise are charged to have occurred from about September, 1944, through March, 1945.)

The evidence indicated that the appellants and others had sold wholesale cuts of meat to various retail butchers at prices in excess of the invoice reflected price. Invoices issued for each sale of meat carried the maximum ceiling price as of the date of such sales; in addition, appellants caused an over-ceiling price to be obtained in cash. The evidence indicated that the price per pound obtained in

excess of the invoiced price per pound, or ceiling price, varied from one to eight cents per pound, in most instances being from four to five cents per pound in excess thereof.

Government's witness Edward F. Cunningham [R. 288 to 291] was a Price Specialist of the Office of Price Administrator during the pertinent periods. Witness Cunningham was shown the various invoices or exhibits having been received into evidence and was prepared to testify concerning the maximum price as the same applied to each meat item as of the dates of the specific sales, whereupon counsel for the appellants stipulated with counsel for the Government that the prices shown for the meat items, beef, veal, pork products, etc., on the invoices were the maximum ceiling prices for those items on the dates of sales [R. 290]. The case was submitted to the jury under this theory, as is reflected in one of the court's instructions [R. 362]. No objection was made by counsel for appellants to such instruction.

For the purpose of convenience we have attached to the close of this subheading a chart of the various Government's exhibits, together with the specific counts that such exhibits were offered in support of. This index of exhibits may be helpful. It should, however, not be construed as an admission that the other exhibits, to which no particular count is referred, were not also offered in support of the entire case.

Appellants, Stillman and Segal, were first engaged in the wholesale meat business, as partners, from about August, 1944, to January, 1945, under the name of Southern California Meat Company No. 2.

Later, the appellants entered into a partnership with another person not on trial, namely, Aaron Rosensweig [R. 154], for the purpose of conducting a meat business

known as the "Central Packing Company." This later partnership started about January 1, 1945, for the purpose of buying, slaughtering cattle, and disposing of and selling the meat [R. 156].

Appellant Stillman was the "head man at the office" and operated the office [R. 157]. Rosensweig's obligation was to buy and provide cattle for the business. Appellant Segal was to take care of the plant operations, cooler, salesmen, etc. [R. 156]. This business operated for a brief period of about three months [R. 158], following which the books of the Central Packing Company (the copartnership) was taken by Mr. Rosensweig to a Mr. Namson, also a witness, for the purpose of having income tax returns prepared. Shortly after this partnership had been terminated the assets were divided between the three partners, as is reflected by the checks [Government's Exhibits 12, 13 and 14].

Witness Samuel Namson [R. 139] testified as to certain statements made in his office during either the month of March or April, 1945, by the appellants Stillman and Segal. These statements or admissions were made with respect to Government's Exhibits Nos. 10 and 11, being certain pages from the books of the Central Packing Company.

Witness Namson stated that he, as an accountant, in his desire to prepare the income tax returns for a former partner, Mr. Rosensweig, had had conversations with both Stillman and Segal [R. 142], and had discussed with them entries in the books of their partnership [Exhibits 10 and 11], and particularly he discussed with reference to an entry in the journal of $30,100 [R. 142-143]. During this conversation witness Namson stated that Stillman told him, Namson, that this money reflected a credit entry

from the sale of meat to different customers, and that appellant Stillman stated, "that this is money which has been accumulated from sale of meat to different customers and he called his bonuses over and above the ceiling prices that they paid" [R. 143]. Witness Namson further inquired of both Stillman and Segal why this $30,100 was not entered to "sales" instead of crediting it to different partners, and then stated that Stillman said they were bonuses and didn't consider them as sales [R. 143-144].

Witness Namson continued, and stated that he called attention to Stillman and Segal that by a correct entry, namely, after the entry crediting the sales with $30,100, that that naturally increased the sales from $1,236,000.00 to $1,266,000.00. This testimony pertained to Government's Exhibit 10 [R. 144-145]. Witness Namson stated that he corrected the trial balance accordingly, thereby increasing the sales, and Mr. Stillman put the item on the document in his presence on that day.

Namson further testified that Stillman stated: "We are in a partnership or joint venture. Three of us invested an equal amount of money" [R. 147]. Upon cross-examination the witness Namson again stated that Stillman in the presence of Segal, had admitted the receipt of a sizeable sum of money from the operation of the business, namely, as bonuses from the sale of meat over and above the ceiling price [R. 149-150].

Various retail meat dealers testified concerning specific purchases they had made, to the effect that they had paid per pound for meat a sum in excess of that reflected by the various invoices introduced into evidence.

Witness William Muehlberger, a merchant [R. 85], stated that during the fall of 1944 he was acquainted with both Stillman and Segal and that he, witness, conducted a

retail market in the vicinity. Witness was shown Exhibit 1, an invoice bearing Serial No. 6034, which pertained to Count 3 [R. 88], and testified that he had bought the merchandise reflected on the invoice and paid for same, and that in addition he had paid a sum over the amount reflected on the invoice, having paid this money to Stillman at the plant known as "Southern California Meat Company," on East Vernon Street [R. 90]. Witness stated that in addition to the check with which he paid for the meat, as per the invoice, he paid an additional sum of money; that he believed it was $120.00 [R. 92]. That he had had a discussion with Stillman at or about this time, concerning whether he could get some meat, and that Stillman stated, "Yes, it will be five cents over, Bill" [R. 93]. Witness Muehlberger gave like testimony concerning over-payments of approximately five cents per pound with reference to invoice Serial No. 6109, offered in support of Count 2 [Government's Exhibit 2], stating that he paid five cents a pound in addition to the invoice price [R. 95]; that this sum was paid in cash and that he received no receipt for the cash payment [R. 98].

Another retail meat merchant who testified was Horace Greeley Weaver [R. 107]. He was an employee of a concern known as the "Clover Meat Company." He stated that during 1945, he had a conversation with Segal with regard to purchasing meat for his employer and they held this conversation at the plant on East Vernon Avenue, known as the Southern California Meat Company. Witness stated that in the conversation with Segal he inquired, "How much do you want over for it, Lou?" and that Segal (Lou) stated, "Five cents." I said, "All right, give me some beef" [R. 111].

Witness identified Invoice No. 718, offered in support of Count 13, and stated he procured this meat and paid for it

by check in the full amount of the invoice; that he had paid money to Segal in addition to the check for the meat so obtained [R. 113], for which he did not obtain a receipt; that this was a cash payment.

Witness Weaver then referred to Exhibit No. 4, offered in support of Count 5, and stated he had paid for this meat by check [R. 115-116], and that in addition he paid five to eight cents a pound but that he was not sure as to which invoice he paid five cents, or as to which invoice he paid eight cents a pound [R. 116].

Witness Weaver gave similar testimony concerning several other transactions wherein he stated he paid sums of money in cash to Segal for meat obtained over and above the invoiced amount.

Witness Leo Blank, an employee for a meat concern, stated that he knew both Stillman and Segal [R. 180], and that he had paid to Lou Segal, first a penny a pound over the invoiced amount [R. 182]; later, he had paid from one to four cents a pound over the invoiced listing [R. 184-185]. This witness testified similarly to various invoices that were offered in support of various other substantive counts.

Clarence S. Wright [R. 214], engaged in the meat business, gave similar testimony concerning payment of moneys in addition to the amount reflected on the invoice. He, in particular, stated that he made his payments to a person by the name of "Irving," to whom Segal had told him he should make such payments [R. 220]. He stated that he paid two cents per pound for beef over the amount reflected on the invoice [R. 222].

Witness Donald Oliver Bircher [R. 231], Special Agent of the Bureau of Internal Revenue, gave testimony con-

cerning an interview he had requested of appellant Segal, stating that Segal had called at the Government office on June 9, 1945 [R. 245]; that Segal gave a voluntary statement after having been advised of his rights [R. 246], and that he was then inquiring concerning the income tax liability of Segal and that of the partnership known as the Southern California Meat Company No. 2.

Witness stated that the interview had been taken down by a stenographer and that, later, on June 15, 1945, Segal had returned to the office and that the statement theretofore taken had been signed by Segal on June 15, 1945 [R. 251]. This is Government's Exhibit No. 33. Bircher had been subpoenaed by the Government.

In conformity with the requirements as provided by 26 U. S. C., Sec. 55, with regard to the publicity of returns, and likewise with the Treasury decisions providing for their utilization by the Department of Justice, certain correspondence and telegrams were introduced in evidence to justify the Government's position in using such returns, and likewise in obtaining the testimony of the Internal Revenue Agents Bircher and Phoebus, who both gave testimony concerning, first, the interview with Segal and the taking of his statement [Government's Exhibit 33], and the testimony that Agent Phoebus gave concerning his conversations with the appellants, Stillman and Segal.

Both of these investigations were in the spring and summer of 1945, and pertained to an investigation being conducted by the Internal Revenue, of the income tax liability of Stillman and Segal and their business under the copartnership names.

The documents which were admitted into evidence and which we feel thoroughly comply with the requirements for prior authority and for the utilization of such returns, and

the obtaining of the testimony of the Internal Revenue Agents Bircher and Phoebus, are the following:

Government's Exhibit 30, being a letter from the Acting Commissioner of the Bureau of Internal Revenue, granting authority for Agent Bircher to testify and cooperate with the Government in connection with the investigation being conducted in this case.

Government's Exhibit 32, being two letters, one of which was a carbon copy of a letter dated September 27, 1945, from the then United States Attorney to the Attorney General, requesting that authority be obtained from the Commissioner of Internal Revenue, as there indicated, and the original letter of October 5, 1945, being a reply by the Attorney General, to such letter.

Government's Exhibit 34, being a telegram from the Commissioner of Internal Revenue, authorizing the testimony of Agents Bircher and Phoebus, and others, in conjunction with this case and other investigations being conducted.

Government's Exhibit 38, being a letter from the Acting Commissioner of Internal Revenue, granting authority as outlined in said letter to Agent Phoebus, in connection with this case.

It is thus apparent that compliance was had with the statute and the Treasury decisions with regard to inspection, utilization and the obtaining of testimony relevant to information possessed by said Special Agents in conjunction with their investigation of the income tax matters of both appellants.

Government's Exhibits 35, 36 and 37 are certified copies of returns, all for the calendar year 1944, dealing with either one or the other of the appellants or their copartnership, the Southern California Meat Company.

Portions of Government's Exhibit 33, a statement that Segal gave, was read into evidence [R. 253]. It should be noted that this testimony was limited to Mr. Segal [R. 302-304].

In this statement Segal stated that in 1944 he and Stillman went into business under the name of Southern California Meat Company No. 2 [R. 255]. Segal stated that while he was engaged in this business, early in 1944, he made collections in the form of "gift money" [R. 257], in addition to the prices received from the sale of meat. Segal conceded that he sold his meat at the regular OPA ceiling price and sometimes received from customers sums of money in addition [R. 257]. Segal stated that most of the customers gave him funds on the side when the meat was sold [R. 258], and that the money was generally paid to him by putting it in his white coat pocket; that no change was ever asked in these donations [R. 260]. Segal stated that early in 1945 he had counted this money and had between $13,000.00 and $14,000.00 [R. 261].

Segal stated that he received this side money from August, 1944, until the end of that year; "when I was in the cooler they put some money in my pocket," and that the majority of meat customers made such payments [R. 264]; that they were becoming more generous [R. 265]. That his biggest day had been just before Christmas; this amounted to $2800.00 [R. 266]. That during the year 1945 the amount received as "contributions," or side money, was approximately $15,000.00 [R. 268]. [This was but for three months.] That he had considered these payments as "extra profits," or "extra gifts" [R. 276]. That the profit for 1944 from customers was approximately $25,000.00 from "side money" payments [R. 279].

Special Agent Samuel A. Phoebus, of the Bureau of Internal Revenue, also testified for the Government [R.

292-308]. He, like Agent Bircher, had also been subpoenaed. This witness was in a position to give corroborative testimony concerning the interview had with appellant Segal, as is reflected by the written statement [Government's Exhibit 33], as he was present when it was taken [R. 307]. It was stipulated that his answers would be similar to those of the previous agent, Bircher [R. 308].

Witness Phoebus, as previously indicated, also had authority to testify. Among other things he stated that in April of 1945, he talked with Stillman and was handed a book of the Southern California Meat Company [R. 294]; that this was handed to him in response to his request to look at such books [R. 295]. This book became Government's Exhibit 39. Certain pages of it were broken down into 39-a, 39-b and 39-c [R. 299]. Witness Phoebus stated that he discussed certain entries in the pages of this book [Exhibit 39] with Stillman [R. 298]. Witness further testified that the investigation he was then conducting was with relation to income tax returns of the Southern California Meat Company No. 2, also Stillman and Segal [R. 299].

Witness Phoebus also testified concerning a conversation he had with appellant Segal [R. 301], and in particular told of a conversation he had had concerning the partnership income tax return [Exhibit 37]. He testified that Segal had told him the item of $13,828.29, reflected on this return, was "side money," and that Segal had given further explanation as to having received this money from customers during 1944, and after that when he worked in the "cooler" of the Southern California Meat Company No. 2 [R. 306]. Witness further testified that Segal stated this was from meat customers.

As stated, a list of Government exhibits and the counts to which certain exhibits were particularly directed, is the following:

Government's Exhibits With Reference to Counts.

(NOTE: In most instances, Government's counsel referred to the count the exhibit had reference to.)

ARGUMENT.

I.

The Indictment Was Valid. An Erroneous Statement In the Caption as Distinguished from the Body of an Indictment Does Not Invalidate Same.

Commencing on page 21 of Appellants' Opening Brief, the contention is urged that the indictment was invalid.

This contention is based on the extreme technical objection that the caption of the indictment, after reciting *September, 1945,* then continued to allege certain facts with reference to February, 1945; whereas, in truth and in fact the "February, 1945," should have been "1946."

A correct reading of the cases cited by appellants and the ones that we shall later refer to indicate that the courts recognize a distinction between an error in the *caption,* as distinguished from the *body* of an indictment.

This is a matter fairly coming within the provisions of 18 U. S. C., Sec. 556 (1946 Edition), pertaining to defects of form in indictments.

We agree with appellants that the *body* of an indictment as distinguished from the *caption* cannot be amended; however, even in the body of an indictment, obvious clerical errors have frequently been held as not fatal.

A case illustrating the distinction between the caption and the body is the following:

Brown v. Hudspeth, 103 F. 2d 958 (C. C. A. 10),

in which case the court held that even erroneous statements of time as to when the offense was committed, was not fatal. In the *Brown* case, petitioner contended that the indictment was void because it was found by the grand jury prior to the date it alleged the commission

of the crime. The caption utilized the allegations the 7th day of April, 1936, whereas, in the charging part of the indictment the offense was charged to have been committed later, namely, on April 29, 1936. The court, in citing many cases in support of its position, held contrary to petitioner's contention and stated as follows:

> "The caption is no part of the indictment. It is merely the record of the court and errors therein may be corrected by amendment. The fact that the caption contains an erroneous statement as to the time when the indictment was found is not a fatal defect which vitiates the indictment. The rule has been applied to cases where the caption recited that the indictment was found prior to the date the offense was alleged to have been committed."

While the Rules of Criminal Procedure were not in effect when this indictment was returned (their effective date having been March 21, 1946), it is believed that even Rule 7 (c) is contrary to the rather technical contention now urged by appellants.

Discussion of Cases Cited by Appellants.

A case appellants rely upon is *United States v. Carney*, 163 F. 2d 784 (C. C. A. 9).

The *Carney* case does not support appellants' position. There, the attempt to amend was to the *body* of the indictment as distinguished from the *caption*. Efforts were made to change an error from "K-14" to "A-14" with reference to an alleged counterfeited gasoline ration coupon. This Circuit recognized on page 790 of the *Carney* opinion, in the cases cited, that there is a distinction between the *caption* and the *body* of the indictment.

On pages 22 and 23 of appellants' brief they refer to the *Johnson* cases. First, the Circuit case of 123 F. 2d 111, which was later reversed by the Supreme Court in the case of *U. S. v. Johnson,* 319 U. S. 503. It is difficult to understand why appellants place such reliance upon these cases. A reading of the Supreme Court *Johnson* opinion, particularly at pages 509 and 510, wherein the court criticized the Circuit and the trial court for its technical holding concerning an order continuing the life of a grand jury which was already conducting an investigation, and in ultimately holding in favor of the government's position, would surely indicate that the rule as announced by the Supreme Court in the latter *Johnson* opinion supports the government's position in this case. As stated, we call attention to the comment made on pages 509 and 510, and will quote but a portion:

> "Since the law permits a continuance of the grand jury 'to finish investigations' begun during its original term, the most elementary requirement of attributing legality to judicial action should, unless violence is done to English speech, lead to a reading of the order of February 28 so as to restrict the grand jury to that which it legally could do instead of to an expansive reading making for illegality."

Appellants now argue that jurisdiction is lacking because it is obviously impossible for a grand jury to continue to investigate in the month of February, 1945, a matter they first started in a later month of the same year, namely, September, 1945. This is but an illustration of an extremely technical objection. Good sense—and we are confident appellants' counsel enjoys such—could lead to no other rational conclusion but that there

was a typographical error. February, 1945 should have been 1946.

Where have appellants shown that they were prejudiced by the mistake of inserting "1945," rather than "1946"?

We are quite in accord with the case of *Ex parte Bain,* 121 U. S. 1, but not with the interpretation appellants would give it. From a reading of the *Bain* case, page 8, is noted a recognition of a distinction between the *body* and the *caption* of the indictment. The *Evaporated Milk Association* case is likewise not contrary to the position of the government. In the *Evaporated* case, the investigation by the grand jury of facts which were later made the subject of an alleged crime had not begun before the date of a petition for authority to continue consideration of a grand jury whose term was about to expire. In other words, the ultimate indictment returned in the *Evaporated* case resulted from new facts and not a continuation; or, as the statutes state, "* * * to finish investigations begun but not finished by such grand jury" (28 U. S. C. A. 421).

Appellants fail to indicate other than that the grand jury which brought the instant indictment had not theretofore commenced investigation of facts which resulted in this charge.

Appellants also rely upon the *Edgerton* case, 143 F. 2d 697; however, this case is not in point for there the trial court had attempted to strike from an indictment a portion thereof, a matter which was not permissible until the adoption of the New Rules of Criminal Procedure,

which now the court is empowered to strike that which is surplusage (*i. e.,* Rule 7(c) of Rules of Crim. Proc.). The *Edgerton* case is definitely in point in favor of the government's position, with reference to the recognition that a distinction is recognized between the *body* and the *caption* of an indictment.

> "The only apparent qualification to the principle of *Ex parte* Bain consistently accepted, is that to vitiate an indictment the portion deleted must be from the body of the count. United States v. Fawcett, 3 Cir., 115 F. 2d 764, 132 A. L. R. 404; Barnard v. United States, 9 Cir., 16 F. 2d 451; Dodge v. United States, *supra*. But here the portion stricken was clearly within the body of each of the substantive counts, and therefor, in that regard as well, is within the protective scope of the doctrine."

Additional Cases Recognizing a Distinction Between the Body and the Caption of an Indictment.

In the case of

U. S. v. Bornemann, 35 Fed. 824,

the court held that a misrecital in the caption of a date, it reading "1885," for "1888," where from the whole record the error appeared to be merely clerical, is not fatal as the caption is no part of the indictment.

To the same effect:

U. S. v. Clark, 125 Fed. 92 (D. C. Pa.);

Lund v. U. S., 19 F. 2d 46 (C. C. A. 8).

In the *Lund* case, by reason of a clerical error, the charge of the offense, even in the body of the indictment, was that it was committed in October, 1925; the information being filed April 8, 1925, correctly the offense should have been charged in October, 1924. The court held that this was not even fatal.

A case holding that an indictment is not invalidated by an obvious error in the repetition of a date, even in the body of an indictment, is that of

Iponnatsu Ukichi v. U. S., 281 Fed. 529 (C. C. A. 9), cert. den. 260 U. S. 729.

Indictments were held good, despite errors existing in same, in the following:

Hogue v. U. S., 192 Fed. 918 (C. C. A. 5).

In the *Hogue* case the charge was perjury before a "clerk" rather than "Court," as intended.

Simmons v. U. S., 18 F. 2d 85 (C. C. A. 8).

In the *Simmons* case it was erroneously charged that the grand jury was sworn in "District Court of Oklahoma," when it should have been "Federal District Court."

Attention is also invited to Government's Exhibit No. 40, a certified copy of the District Court's Order for the Continuance of the Grand Jury. This Order complies with the requirements of 28 U. S. C. A. 421.

II.

Neither the Amendment to the Statute nor the Revision of the Regulation Acted to Terminate the Prosecution Herein.

The Indictment Meets All Enlightened and Modern Conceptions of Tests Required to Properly Inform the Accused of the Elements of the Offense Intended to Be Charged.

Appellants again argue that because the indictment omitted the use of the term "As Amended," with reference to the "Emergency Price Control Act of 1942," and also omitted the term "Revised," with reference to Regulation 169, such entirely invalidates the charge.

In the first place it should be noted that the Act itself, even as late as the citation noted in 50 U. S. C., Appendix, Sec. 946 (1946 Edition), clearly indicates that there is no necessity to refer to the Act in question by adding the phrase "As amended." We quote from the Act itself:

> §946. Short title.
>
> "This Act [sections 901-922 and 923-946 of this Appendix] may be cited as the 'Emergency Price Control Act of 1942.' (Jan. 30, 1942, ch. 26, title III, §306, 56 Stat. 37.)"

Where do appellants show that they were prejudiced by the omission of the phrase "As amended?" Such an argument is mere words. A common sense appreciation of realities must govern. The utilization or the absence of phrases which do not cast appreciable enlightenment are not like the talismanic command "Open sesame," the magical command which opened the door of the robbers' den of an Arabian Nights tale of the "Forty Thieves."

We seriously question, and counsel has not shown where he or his clients were taken by surprise by the failure of the indictment to include the phrase "As Amended," or "Revised," with reference to the pertinent regulation.

It should be recalled that this case was tried during the latter part of June, 1946, the verdict being given July 2, 1946. This is not a case that was tried during the early days of "war-time" statutes; nor was it the first of such cases where convictions had been secured. In fact, many affirmations on appeal had been had of like offenses prior to the date of trial of this case.

It is true that the "Emergency Price Control Act of 1942," as initially adopted in January of 1942, was by its terms to have terminated long prior to the date of the offenses charged herein; however, that section of the statute (50 U. S. C. 901(b)) dealing with extensions of the termination date was amended from time to time and the statute was in force and effect at all dates pertinent to the charges contained in this indictment. Reference is invited to the dates of the amendments as noted under Sec. 901(b), Title 50, U. S. C.

Appellants contend that at a later time the Act became "the Stabilization Act of 1944," and that such is not charged in the indictment. It is true (58 Stat. 632) that the Act which went into effect on June 30, 1944, and which covered most of the period charged in this indictment, stated that:

> "This Act may be cited as the Stabilization Act of 1944."

However, immediately thereunder we find the following:

> "Title I—Amendments to the Emergency Price Control Act of 1942."

This case was tried upon the theory of the Act in effect as of the date pertinent to the offenses charged. The instructions given by the court, in reading both from the Act and the Regulations, were from the Act and the Regulations as they existed as to the dates pertinent to the charges. Appellants fail to indicate any place where the Regulations or statutes were improperly defined or read to the jury. Their only complaint is, the case must be reversed because of the omission of the phrase "As Amended," or "Revised."

In the appendix to this brief, and likewise in the appendix of appellants' brief, a portion of Revised Maximum Price Regulation No. 169 is set forth. We have sought to copy the pertinent portions of this Regulation from the Revised Regulation No. 169, that was in effect as of the dates charged.

Let us look at realities. Revised Maximum Price Regulation No. 169, the one pertinent to the charges here contained was issued December 10, 1942, effective December 16, 1942 (7 Fed. Reg. 10381). An inspection of this Regulation certainly does not indicate that the matter came to an end upon its adoption. It is a rather lengthy Regulation and was amended from time to time in particulars nonsignificant to the complaints now urged. This Revised Maximum Price Regulation 169 contains schedules, des-

ignated certain cuts of meat and what wholesalers could charge for same. It describes zones and exhaustively covers many kindred matters. At the outset of this Revised Regulation 169 is set forth the consideration or the purposes for such Regulation.

As stated, this Revised Regulation was amended from time to time. Such is well known to be the case with almost every "wartime" Regulation; however, appellants have not pointed out—and we are confident they cannot —that this regulation or its amendment was not in effect as of the dates charged. We have read many of the amendments that were later issued but have been unable to find any amendment or regulation that would indicate a substantial repeal as counsel has implied.

As a matter of fact, the Emergency Price Control Act has often been cited as such, without "As Amended:"

Kraus & Bro. v. U. S., 327 U. S. 614 (1946);

U. S. v. Armour & Co., 168 F. 2d 342 (1948) (C. C. A. 3);

Krimm Lumber v. Turney, 163 F. 2d 72 (1948) (Emer. Ct. App.);

Quirk v. U. S., 161 F. 2d 139 (1947) (C. C. A. 8);

Morgan v. U. S., 149 F. 2d 185 (1945) (C. C. A. 5), cert. den. 326 U. S. 731;

U. S. v. Friedman, 50 Fed. Supp. 584 (1943) (D. C. Conn.).

Repeal of a Statute Does Not Affect Existing Liabilities or Crimes.

At several points throughout Appellants' Opening Brief the contention is urged that the Act was not in effect as of the dates charged. There, again, much ado is made over the omission of the words "As Amended," and "Re-

vised." A mere inspection of the Act reveals that the contention urged is not sound and that assertion is patently in error. 50 U. S. C. 901(b) provides for the date of termination and states:

> "* * * except that as to offenses committed, or rights or liabilites incurred, prior to such termination date, *the provisions of this Act and such regulations,* orders, price schedules and requirements *shall be treated as still remaining in force for the purpose of sustaining any* proper suit, action, or *prosecution* with respect to any such right, liability or offense." (Italics supplied.)

If the foregoing from the Emergency Price Control Act of 1942 were not of itself sufficient, we call attention to the well established rule that the repeal of a statute does not affect existing liabilities unless the repeal expressly so provides. To this effect, see:

> 1 U. S. C., §§109 and 110 (formerly 1 U. S. C., §§29 and 29[a]).

To like effect, with respect to a prosecution under this same Emergency Price Control Act, see:

> *Quirk v. U. S.,* 161 F. 2d 138 (C. C. A. 8).

To like effect:

> *U. S. v. Hark,* 320 U. S. 531.

In a prosecution under this same Regulation, *i. e.,* 169, and the same Act, the Supreme Court held in the *Hark* case that the revoking of a pertinent provision of a Regulation was not a bar to an indictment for a violation committed when the Regulation was in force.

III.

The Modern Practice of the Federal Courts Is to Consider the Adequacy of Indictments on the Basis of Practical as Opposed to Technical Considerations.

It has been established that for a pleader to set forth that certain facts are in violation of a certain statute neither adds nor detracts from the allegations which alone must measure the sufficiency of such pleading:

> *Taylor v. U. S.*, 2 F. 2d 444 (C. C. A. 7), cert. den. 266 U. S. 634.

It has been held that an indictment, to be valid, need not even refer to any particular statute if the facts themselves state an offense:

> *U. S. v. Brogren*, 63 Fed. Supp. 702 (D. C. Mass.).

This Circuit in its more recent opinions has shown a liberal view with regard to sufficiency of indictment. We refer to the following:

> *Todorow v. U. S.*, 173 F. 2d 439 at p. 447.
>
> "* * * Modern, Federal criminal pleading, as confirmed by the Rules of Criminal Procedure, sanctions a plain, concise statement, in broad outline, of the offense charged, without particularity as to its details. An information, or indictment, is sufficient to meet modern requirements if it alleges basic facts covering the essential elements of a crime against the United States with enough particularity to fairly apprise the defendant of the nature of the charge and to enable him to protect himself from a subsequent prosecution for the same offense."

Surely the indictment in the instant case meets all the tests set out in the above and the authorities later referred to.

An inspection of the indictment in the instant case [R. 2 to 26, incl.] will indicate that as to every count, and especially at the outset of each substantive count, the following designation is noted: (50 U. S. C. App. 901, *et seq.*) Such designation can mean only one thing, namely, the law that was effective as of the dates charged in each of the respective counts. Judicial notice can readily be taken, and should be taken, to such amendments without the necessity of express allegations of "As Amended." The reference to a statute certainly carries with it references to any and all of its amendments.

Additional cases supporting the rule that an indictment should be determined on the basis of practical rather than technical considerations are the following:

U. S. v. Bickford, 168 F. 2d 26 (C. C. A. 9).

In the *Bickford* case a perjury indictment was held to be sufficient although it did not directly aver that the officer administering the oath had competent authority to administer same. To like effect:

Flynn v. U. S., 172 F. 2d 12 (C. C. A. 9) [Perjury];

U. S. v. Ochoa, 167 F. 2d 341 (C. C. A. 9) [Murder];

McCoy v. U. S., 169 F. 2d 776 (C. C. A. 9) [False claims].

An examination of the indictment will illustrate that the conspiracy count (Count 1) is very specific. It charges that the conspiring commenced on or about July 1, 1943,

and continued thereafter until its filing (March 11, 1946). It gave the place; it charged the unlawful conspiring, and then sets forth certain specific paragraphs, from "a." through "k.," alleging not only as to the Emergency Price Control Act of 1942, but also to the therein designated maximum price regulations pertaining to meat, and then followed with several overt acts, namely, from (a) through (r). In the overt acts, dates are mentioned, particular invoices as to their serial number are given, and amounts are designated.

The substantive counts, by way of illustration, Count 2, gave the statutes, the regulation involved, the time and place, the name of the person who had paid to the defendants a sum of money in excess of the maximum ceiling price, the invoice serial number, and the amount per pound of the particular meat product as allowed by the regulations as to the date involved. Count 2 is one of the counts charging the sale for over-the-ceiling price.

As an illustration of a count involving a false entry charge, we refer to one of such counts, namely, Count 12. This count is likewise extremely specific. It is difficult to see how any of such counts could have been more specific unless they had been evidentiary.

This Court recently held, with reference to the sufficiency of an indictment and in sustaining same, in the case of

> *Nissen v. U. S.*, 168 F. 2d 846 at p. 849 (C. C. A. 9), Aff. 336 U. S. 613,

as follows:

> "This general allegation does not stand alone. It is followed by a detailed description of the means by which the conspirators planned to impede, etc., the

government's inspection functions. Taken in context, it is sufficiently definite to inform the defendants of the charges against them. It shows 'certainty to a common intent' and greater particularity is not required. Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 68."

The correct rule for determining the sufficiency of an indictment is as follows:

The indictment need only be a "plain, concise and definite written statement of the essential facts constituting the offense charged."

Rules of Criminal Procedure, Rule 7(c).

As the Supreme Court said in *Hagner v. United States*, 285 U. S. 427, 431-4 (1932):

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States*, 157 U. S. 286, 290; *Rosen v. United States*, 161 U. S. 29, 34."

This indictment clearly meets these tests.

For like authority see

Armour Packing Company v. U. S., 209 U. S. 56, particularly pages 83 and 84.

This circuit has sustained an information which is substantially similar to the charges herein involved and which likewise involve a violation of Maximum Price Regulation No. 169 (beef, etc.), in violation of the Emergency Price Control Act of 1942. See the following:

Flannagan v. U. S., 145 F. 2d 740 (C. C. A. 9).

Attack on Revised Maximum Price Regulation 169 has been before the Emergency Court of Appeals and decided favorable to the government.

See:

Superior Packing Co. v. Clark, 164 F. 2d 343 (Emer. C. A.);

Ormont v. Clark, 164 F. 2d 354 (Emer. C. A.).

The contentions urged by appellants have been heretofore presented in a rather analogous case.

We refer to:

Kersten v. U. S., 161 F. 2d 337 (C. C. A. 10), cert. den. 67 S. Ct. 1744.

In the *Kersten* case the Information charged violation of the Emergency Price Control Act, As Amended, while the dates alleged were clearly subsequent to June 30, 1946, at which times said Act had expired but was, shortly after, revived by the Price Control Extension Act of 1946. In the *Kersten* case it was contended that there was error in not charging that such acts were in violation of the

Price Control Extension Act, rather than as charged in violation of the Emergency Price Control Act. The court disposed of the matter far more tersely than we, we regret, have been able to in this brief, by stating at page 339:

> "It is true, the caption and body of the information do not refer to the Price Control Extension Act. But, the facts alleged clearly charged a violation of §4, as extended, and the failure to cite the Price Control Extension Act could not have misled Kersten to his prejudice."

Reference to a Wrong Statute Does Not Invalidate an Indictment.

As noted above, the *Kersten* case illustrates that facts and not designation of names is the controlling factor in consideration of an indictment. In other words, actual prejudice must be shown and must result. This is a practical world and no longer are the courts inclined to heed frivolous complaints based upon overly nice but unprejudicial omissions.

It is well settled that even reference to a wrong statute, whether in the caption of the indictment or in the body, does not void the indictment.

To this effect, see:

Martin v. U. S., 99 F. 2d 236 (C. C. A. 10);

Biskind v. U. S., 281 Fed. 47 (C. C. A. 6), cert. den. 260 U. S. 731, 28 A. L. R. 1377;

Vedin v. U. S., 257 Fed. 550 (C. C. A. 9).

It has also been held that reference to a wrong statute in an indictment does not invalidate the indictment if the acts charged therein are sufficient to constitute an offense under some other statute of the United States.

To this effect, see:

Capone v. U. S., 51 F. 2d 609 at 616 (C. C. A. 7), cert. den. 284 U. S. 669;

U. S. v. Hutcheson, 312 U. S. 219 at 229.

> "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams v. United States,* 168 U. S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman Law but the related enactments which entered into the decision of the district court."

Discussion of Certain Cases Noted by Appellants.

Appellants place great reliance upon the case of *M. Kraus*, discussing same on page 34 of their brief and at other places. We feel that this case is not in point and certainly not in support of appellants' position. The *Kraus*

case, 327 U. S. 614, is the one which pertained to "tie-in," or "combination" sales of chickens. It pertained to Poultry Regulation 269, not the instant Regulation 169. We feel that the language of the *Kraus* opinion definitely supports the validity of RMPR 169, here involved, and points out the distinction or flaw which existed in the Poultry Regulation No. 269. The court pointed out in the *Kraus* opinion that "tying" agreements were not prohibited by the pertinent poultry regulations, and illustrated on page 625 that the Administrator had specifically prohibited the "tying" agreements in the meat regulation, RMPR 169, as amended March 30, 1943, and in other similar such regulations.

Reference on pages 38 and 39 of appellants' brief, to the *Hutchinson* opinion, 312 U. S. 219, also is not justified. The *Hutchinson* case pointed out that even a wrong reference to a statute in an indictment does not invalidate same if the facts charged are sufficient to constitute an offense. It is difficult to understand how appellants can argue that the facts charged in the instant case are not sufficiently certain. To have gone further would have been to recite evidence. The facts alleged are certainly ample to protect the accused from a charge for the same or a similar offense.

It is difficult to see where appellants find any aid in the *DeJonge* opinion referred to on page 40 of their brief. It is of course well established that convictions cannot be supported upon a charge not made. The *DeJonge* case pertained to the criminal syndicalism law then in existence in the State of Oregon, which was held to be bad as op-

posed to guarantee of free speech and due process assured by the Fourteenth Amendment.

The reference to the *Viereck* case, 318 U. S. 236, is also not to point. The court clearly pointed out, in reversing the conviction had in the *Viereck* case, that the statute did not require registrants to make statements of their activities other than those in which they had been engaged as foreign agents. We fully agree that an indictment must be a clear and concise written statement and sufficiently definite to protect him against a subsequent charge for the same offense. However, where have appellants illustrated to this court any holding so declaring the invalidity of RMPR 169, here involved, or of the Emergency Price Control Act of 1942, likewise here involved?

The *Samuels* case of this Circuit, 169 F. 2d 789, referred to in appellants' brief on page 41, and at other places, is likewise stretching an opinion beyond its announcements. The *Samuels* case is readily distinguishable from the instant case. In the instant case, excepting for the omission of the now contended magical words "As Amended," or "Revised," appellants fail to show where this court improperly charged the jury as to the regulation and statute that was in effect as of the date of the offenses alleged to have been committed. In fact at time of trial, when the government had placed the witness Edward F. Cunningham, the Price Specialist of OPA, on the stand [R. 288-291], counsel representing appellants stipulated with regard to such testimony and, furthermore, raised no

objection to the court's instruction as ultimately given with reference to the price per pound authorized, as will be noted [R. 362].

A different situation existed in the *Samuels* case. No agreement was entered into as to what price was permitted for the whisky involved. In the *Samuels* case three separate statutes were charged to have been violated by reason of the conspiracy. In the instant case no objection appears to have been made to the court's instruction now complained of, with respect to the specific price permitted per pound for the meat in question. Furthermore, this instruction is a correct statement of the law as announced by the relevant regulation. In the *Samuels* case the trial court had erroneously instructed on one of the three laws involved in the conspiracy charged, hence there was no way of determining whether the verdict was based upon a correct or incorrect instruction. The *Samuels* case further discussed the proposition of special and general verdicts.

The court's right to have instructed the jury with regard to the amounts allowed per pound is well established by a similar case of this Circuit also pertaining to Regulation 169, namely, the sale of meat.

To this effect, see:

Flannagan v. U. S., 145 F. 2d 740 (C. C. A. 9).

In the *Flannagan* case this Circuit also held, with regard to the element of intent, that a wilful sale at an excessive price necessarily implies specific intent to sell it (meat at such a price).

IV.

The Court Did Not Err in Refusing to Grant Defendants' Request for a Bill of Particulars.

It has heretofore been pointed out that this indictment was quite specific. It was surely sufficiently definite to inform the defendants of the charges against them.

It is well settled that a bill of particulars is properly denied where the indictment is reasonably definite as to the offense charged. To this effect:

Robinson v. U. S., 33 F. 2d 238 (C. C. A. 9).

And the true rule is, that the discretion of the court in denying a bill of particulars is not reviewable except in a case of abuse of discretion.

To this effect see:

Wong Tai v. U. S., 273 U. S. 77.

Quotations from two opinions which we feel are most appropriate, are the following:

Nye & Nissen v. U. S., 168 F. 2d 846 at p. 851 (C. C. A. 9), aff. 336 U. S. 613.

> "It is elementary, of course, that the denial of a bill of particulars is not ground for reversal if it does not amount to an 'abuse of discretion.' Wong Tai v. United States, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545. We agree with appellee that the indictment here is an exceedingly specific document, and that no abuse of discretion is shown to have resulted from the trial court's refusal to compel disclosure of further particulars. Although it may be true that defendants could not have known in advance of trial what various facts and circumstances were to be relied upon by the

government as proof of the alleged conspiracy, this does not necessarily indicate that they were prejudiced by the denial of their motion. The government should not be compelled by a bill of particulars to make a 'complete discovery' of its entire case. Braatelien v. United States, 8 Cir., 147 F. 2d 888; Rubio v. United States, 9 Cir., 22 F. 2d 766, certiorari denied 276 U. S. 619, 48 S. Ct. 213, 72 L. Ed. 734."

Kempe v. U. S., 151 F. 2d 680 at p. 685 (C. C. A. 8).

"* * * As heretofore shown, the information referred specifically to the regulations and the statutes involved. The purpose of a bill of particulars is to secure facts, not legal theories. Rose v. United States, 9 Cir., 149 F. 2d 755, 758; Flannagan v. United States, *supra.*

"In Braatelien, *et al.,* v. United States, 8 Cir., 147 F. 2d 888, 892, this court said: 'Moreover, a motion for a bill of particulars is addressed to the sound discretion of the court and, unless it is made to appear that this discretion has been abused, the ruling will not be reversed. Hartzell v. United States, 8 Cir., 72 F. 2d 569, 575; Pines v. United States, 8 Cir., 123 F. 2d 825, 829.'

"We are convinced that the defendant was not lacking as to information of the acts charged to have been committed by him and the regulations and statutes violated thereby. Thus the court did not err in overruling the motion for a bill of particulars."

It is of course well settled that judicial notice is taken of regulations or matters published in the Federal Register. Such publication creates a rebuttal presumption of notice. Such is so declared by statute 44 U. S. C., Sec. 307, and likewise by a similar case of this Circuit involving a prosecution under this same Act and Revised Maximum Price Regulation 169, namely, *Flannagan v. U. S.*, 145 F. 2d 740 (C. C. A. 9).

We have heretofore pointed out that each and every count of this indictment was very specific. To have pleaded more would have been to plead evidentiary facts.

It should be recalled that the defendants were engaged in the wholesale of meat products. Surely, as such, they were aware of regulations pertaining to their industry, especially since their industry had most of its customers within the metropolitan area of Los Angeles. The defendants saw fit not to take the stand; consequently there is no evidence contrary to that offered by the government.

Where have they shown any prejudice from the denial to grant the bill of particulars, for in no place do they state that the court read to the jury regulations or laws that were not in effect as of the dates charged. Their repeated but frivolous charge is: The indictment fails to use "As Amended," with reference to the Act, or "Revised," with reference to the Regulation.

By whatever name you may call them, or whatever adjectives are appended to such law and regulations; they were still equally valid and in existence as of the dates charged and as instructed by the court.

V.

The Evidence Was Entirely Sufficient to Justify the Verdict as to Each Count. The Verdict Was Fully in Accord With the Law.

On page 51 of appellants' present brief there commences the contention that the evidence is insufficient to support the verdict. Here again we see the already well worn contention being repetitiously urged that the indictment charged offenses under the Act and Regulation that were later amended and revised. We feel we have answered these contentions and have shown that no prejudice resulted to appellants from such omission, even though it might have been better practice to have inserted in the indictment the phrase "As Amended," and the term "Revised."

There are certain well-established rules governing appeals. Before discussing in detail certain of the contentions urged by appellants with regard to the contended insufficiencies of the evidence, we feel that it will not be amiss to digress and set forth a few of these principles. They are as follows:

1. Appellate courts will indulge all reasonable presumptions in favor of the trial court and draw all inferences permissible from the record, in determining whether the evidence is sufficient to sustain a conviction.

To this effect:

Henderson v. U. S., 143 F. 2d 681 (C. C. A. 9).

2. Appellate courts will rarely substitute its views on the weight of the evidence for those of the jury, even though the appellate court might have reached a different conclusion.

To this effect see:

Jordan v. U. S., 87 F. 2d 64 at p. 67 (C. A. D. C.).

3. Normally, the sufficiency of the evidence is a jury question. A fairly recent case in support of this proposition, and pointing out that the appellate court is not called upon to weigh conflicting testimony but only to determine whether there was some evidence competent and substantial before the jury, fairly tending to support the verdict, is

Hemphill v. U. S., 120 F. 2d 115 (C. C. A. 9), cert. den. 314 U. S. 627.

To like effect:

Crumpton v. U. S., 138 U. S. 361.

In view of the above well-settled principles, an analysis of the testimony will clearly show that there was sufficient evidence before the jury to have found the existence of a conspiracy upon the part of both Stillman and Segal. They were both engaged in the same common enterprise. The testimony clearly shows that Segal told several retail meat merchants that they would have to pay a sum of money in excess of the ceiling price; that Stillman did likewise, as to at least one of such merchants, the witness Muehlberger [R. 90 and 93]. The evidence shows that the invoices did not reflect the true price as to those counts pertaining to false entries, and likewise as to the count pertaining to the alteration of the books of the partnership, Count 32.

The evidence also shows that there was the existence of a partnership, first under the name of the Southern California Meat Company No. 2, existing between Stillman and Segal, commencing in August of 1944, and following which an additional partnership existed between Stillman,

Segal and Rosensweig, commencing about January of 1945, under the name of Central Packing Company.

Appellants contend that there is no proof of an unlawful agreement. This Circuit, and others, has repeatedly held that the proof of an unlawful agreement may be had by circumstantial evidence. To such effect see the often quoted case of

> *Marino v. U. S.*, 91 F. 2d 691 at p. 694 (C. C. A. 9).

See:

> *Quirk v. U. S.*, 161 F. 2d 138 (C. C. A. 8).

In affirming a conspiracy prosecution pertaining to the Emergency Price Control Act of 1942, in the selling of corn in excess of the ceiling price, this broad principle of participation being inferred from the facts and circumstances is again announced.

In a very recent case from this Circuit, this rule is again announced. See:

> *Nye & Nissen v. U. S.*, 168 F. 2d 846 (C. C. A. 9), aff. 336 U. S. 613.

This Court, on page 852 of the *Nye & Nissen* opinion, stated as follows:

> "The existence of a conspiracy may be inferred from acts of persons which are done in pursuance of an apparent criminal purpose. Blumenthal v. United States, 9 Cir., 158 F. (2d) 883, affirmed 332 U. S. 539, 68 S. Ct. 248.
>
> * * * * * * * *
>
> "Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a

defendant with it. Meyers v. United States, 6 Cir., 94 F. 2d 433, certiorari denied 304 U. S. 583, 58 S. Ct. 1059, 82 L. Ed. 1545; Phelps v. United States, 8 Cir., 160 F. 2d 858. The evidence here is more than slight."

A case additionally to point is the following:

Braverman v. U. S., 125 F. 2d 283 (C. C. A. 6) (reversed on other grounds, 317 U. S. 49).

In the *Braverman* case the rule with respect to reasonable inferences that may be drawn from all the facts and circumstances, to show the existence of the conspiracy, is noted in the following language (p. 286):

"The rule of our circuit and others was clearly stated and approved by Mr. Justice Sutherland, retired, with whom sat the present Chief Justice and Circuit Judge Clark in United States v. Manton, 2 Cir., 107 F. 2d 834, 839: 'It is not necessary that the participation of the accused should be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often if not generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances. In passing upon the sufficiency of the proof it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it. Hodge v. United States, 6 Cir., 13 F. 2d 596; Fitzgerald v. United States, 6 Cir., 29 F. 2d 881.'"

It is, of course, well settled that co-defendants may be liable even though they only aid and abet one anotner. This principle is statutory.

18 *U. S. C.*, Sec. 550 (1946 Edition).

There are many cases construing this point, including the case of *United States v. Pinkerton*, 328 U. S. 640 at p. 647.

This principle is acknowledged in this Circuit in the *Nye & Nissen* case. 168 F. 2d 846 at p. 854 of the opinion. (Aff. 336 U. S. 613.)

Additional authorities upon the principle of holding joint confederates liable for the acts of the confederate, even under substantive charges upon the theory of aiding and abetting, are the following cases:

Bozza v. U. S., 330 U. S. 160 at p. 164;

Borgia v. U. S., 78 F. 2d 550 (C. C. A. 9), cert. den. 296 U. S. 615;

U. S. v. Olweiss, 138 F. 2d 798 at p. 800 (C. C. A. 2), cert. den. 321 U. S. 744.

In Answer to Additional Specific Complaints Raised by Appellants, Discussing the Alleged Insufficiency of the Evidence.

We have already covered the point that the evidence was entirely sufficient to have supported the jury's verdict that a conspiracy existed and could logically be inferred to have existed as charged. It should be noted that neither of the appellants testified; they were content to conclude without offering any affirmative evidence. It is well settled that no corroboration need be had of the testimony of an accomplice, if it can be said that the retail merchants who purchased this meat were accomplices. In the federal

courts it is well settled that the testimony of an accomplice alone will support a conviction; and, further, that the court is not compelled—although it is better practice—to give an instruction along this line.

To this effect:

Caminetti v. U. S. 242 U. S. 470 at p. 495;

Hass v. U. S., 31 F. 2d 13 (C. C. A. 9), cert. den. 279 U. S. 865, and

Pine v. U. S., 135 F. 2d 353 at p. 355 (C. C. A. 5), cert. den. 320 U. S. 740.

A rather recent opinion of the Supreme Court supports the proposition that by reason of the aiding and abetting statute, acts committed by one conspirator are attributable to his co-conspirator for the purpose of holding him liable for the substantive offense, and this is true whether the overt acts charged in the conspiracy count were also charged and proved as substantive counts, pointing out that the agreement to do an unlawful act is distinct from the doing of the act.

To such effect:

Pinkerton v. U. S., 328 U. S. 640.

Complaint is urged that there was only one merchant, namely, the witness William Muehlberger, who testified with relation to over-ceiling purchase discussions with the appellant Stillman, and appellants urge that there is no evidence of any conspiracy in his testimony. To this we again reply that even the testimony of one witness concerning such factors is sufficient. The witness Muehlberger stated, in effect, that Stillman told him if he was to secure meat he would have to pay five cents per pound

over the ceiling price [R. 93-95], and that he, the witness, paid such sum over and above the ceiling price. This, coupled with admissions made by Stillman to the witness Namson, in the presence of Segal, wherein Stillman stated that a sum of money reflected on a book of the partnership resulted from bonuses over and above the ceiling price [R. 143], together with the partnership between Segal and Stillman, and other pertinent evidence, was sufficient to support the jury's verdict, especially when there was no evidence to the contrary.

The complaint concerning the testimony of witness Namson, commencing on page 54 and also discussed in other parts of appellants' brief, overlooks the fact that this testimony pertained to admissions voluntarily made by either Segal or Stillman in the presence of Namson, and they were offered as such admissions. To discuss them in detail would be to over-lengthen this reply brief. Counsel complains that testimony of Internal Revenue Agent Bircher (App. Br., p. 55) pertaining to disclosures made by Segal concerning his income tax, is not proof of conspiracy or a declaration in furtherance thereof. To this we fully agree that this does not prove a conspiracy nor was it offered for that purpose. A fair reading of the transcript will clearly reveal that this testimony was offered as to, and was *limited solely* to, the defendant Segal [R. 302-304].

Counsel's reference to the *Krulewitch v. U. S.* case, 336 U. S. 440, does not support his claims. The *Krulewitch* case pertained to a Mann Act prosecution, where the Supreme Court held it was improper to utilize against a co-conspirator standing trial the remarks between a victim and another conspirator occurring six weeks after the transportation. The evidence was not

offered in the *Krulewitch* case as offered here, namely, against the person making the utterance. We are, and of course must be, in full accord with the *Krulewitch* opinion and also its very excellent discussion criticizing the over-use of the conspiracy charge. In other words, the *Krulewitch* case holds that a co-conspirator is not bound by the remarks of a fellow conspirator, occurring after the fulfillment of the conspiracy. It does no violence to the established rule that admissions are always admissible against the person making same.

The *Fiswick* case is also not properly applied. That case holds that a confession or admission of a co-conspirator after his apprehension is not binding on the other, and also that a conspiracy terminated with the last overt act. It is obvious that such opinion does not apply here.

Appellants also argue that evidence was not offered to support each and every one of the matters referred to in the conspiracy count. We need not cite authorities to prove that such is not required. The offense is the conspiracy and an overt act performed in furtherance thereof. Appellants are incorrect when they state that no overt act was proved, as they contend on page 56 of their brief. Without going into all of such overt acts that were established, we specifically call attention that overt act "r" of Count 1, is fully supported by Government's Exhibit No. 9, admitted into evidence [R. 123]. This pertained to the payment by the merchant, witness

Weaver, of over-ceiling sums paid per pound for beef of from five to eight cents per pound. There was no testimony to the contrary.

We concede that no testimony was offered in support of several of the overt acts; however, even the proof of one is sufficient.

Marino v. U. S., 91 F. 2d 691 (C. C. A. 9).

There is also authority to the effect that proof of an overt act in furtherance of a conspiracy, although not charged, is proper.

U. S. v. Negro, 164 F. 2d 168 (C. C. A. 2).

The complaint urged with respect to lack of proof to hold each defendant as to the substantive counts has heretofore also been frequently urged, but it is well established under 18 U. S. C. 550, that a person is liable for an act of his confederate even under a substantive charge, upon the theory of aiding and abetting.

Nye & Nissen v. U. S., 168 F. 2d 846 (C. C. A. 9), affd. 336 U. S. 613.

Appellants also argue that there is no evidence that the defendants, or either of them, made or caused to be made any false entries on the invoices involved; and, further, they urge that the sales records or invoices are not the type contemplated by the regulation which requires the making and retention for inspection of accurate records of each sale. With regard to the proof of the

defendants making such entries we feel the evidence clearly establishes that both appellants, as partners of this concern, caused sales records, a duplicate copy of which was given to the buyer, to reflect the proper selling price, but which records were false and incorrect in that they failed to reflect entirely what was charged to the various merchants, i.e., the side payments.

In the appendix we have set forth a portion of the Revised Maximum Price Regulation No. 169. We now call attention to the portion commencing, "SECTION 1364.407—RECORDS AND REPORTS." A reading of this subdivision of the regulation will clearly reveal that a practical interpretation to be given such regulation is that the wholesaler of beef, veal, etc., shall make and preserve sales records and they shall be accurate, showing the "date," "name and address of the buyer," "quantity, type of cut," "grade," "and the price charged or received or paid therefor."

How the regulation could be any more specific and upon what grounds appellants now challenge same is difficult of comprehension.

Appellants would argue that there is no proof offered that these sales records and books were the kind required to be kept, and that the prosecution failed to produce evidence to that effect. Had any effort been made to have characterized such sales slips and books, counsel would have then objected that such evidence was calling for a conclusion. It is felt that this matter was amply and properly covered by the court's instruction and that

the regulations speak for themselves and fully cover the subject here involved.

Appellants fail to cite a single case supporting their charge that such sales slips and books of a concern have not been held to be the type required by the provision of RMPR 169.

The Contention That the Side Payments Were Tips Is Evasive and Unfounded.

On page 62, appellants repeat the unique contention that the price received over and above the ceiling price for the meat sold was in the nature of "gifts," "tips," or "gratuities," pointing out that they were similar to a tip given to a waiter when presented with a restaurant bill. This contention is so flimsy and unsound that it is hardly worthy of reply. Suffice it to say that each of the witnesses testified that they paid certain specific set prices per pound above ceiling price to one or either of the appellants or other employees, for all meat received and were given to understand if they didn't so pay they wouldn't receive the meat. Tips may often be placed under one's coffee saucer and to that extent be concealed, but there and there alone is there any similarity between the over-ceiling charges demanded and received by the appellants and the contention that they were "gifts" or "tips." The regulations specifically provide that they "shall not be evaded, either by direct or indirect methods" (see appendix to this brief), R. M. P. R. No. 169, Sec. 1364.406.

VI.

The Regulations Were Sufficiently Definite.

On page 63 of appellants' brief the contention is urged that Revised Maximum Price Regulation 169, the one most pertinently involved, is so uncertain it cannot form the basis of any criminal prosecution. Again we note that appellants rely upon the *Krause* case, 327 U. S. 614. We have hertofore pointed out, page 36 of this brief, that the *Krause* opinion approved of the instant Regulation 169 but held invalid the Poultry Regulation 269, because it did not specifically prohibit "tying" agreements as the instant Regulation 169 does.

The validity of the regulation in question has been sustained upon numerous occasions. We have cited many cases to such effect. It has been the subject of attack before the Emergency Court of Appeals and there, too, has been sustained.

See:

Superior Packing Co. v. Clark, 164 F. 2d 343 (Emer. C. A.);

Ormont v. Clark, 164 F. 2d 354 (Emer. C. A.).

Even a stronger answer to this contention is the very Act itself, where Section 204(d) of the Emergency Price Control Act as originally adopted and likewise as amended, or 50 U. S. C. 924(d), specifically provides that no court other than the Supreme Court of the Emergency Court of Appeals has jurisdiction to determine the validity of the regulations. This principle has been noted in the Supreme Court case which specifically dealt with RMPR 169 and sustained its validity to the there attack, namely, in the opinion of—

Yakus v. U. S., 321 U. S. 414 at p. 422.

In the opinion affirmed by the *Yakus* case, namely, *Rottenberg v. U. S.*, 137 F. 2d 850, and which sustained the validity of RMPR 169, it is pointed out that if one wished to challenge such regulation he should have followed procedure provided for in the Act.

VII.

No Error Was Committed Either in Admitting the Income Tax Returns or the Statement Given by One Appellant to the Internal Revenue Agents.

Commencing on page 65, the contention is urged that error existed in admitting in evidence the income tax returns. These consisted of certified copies of returns and are identified in the record as Government's Exhibits 35, 36 and 37.

We shall hereafter cite additional authority in support of their introduction but at the present time we wish to state that we cannot agree with the interpretation that counsel has placed upon the *Greenbaum* case, cited on page 65 of appellants' brief. We respectfully submit that the *Greenbaum* case holds that certified copies of tax returns are admissible. In the instant case, even less objectionable than that noted in the *Greenbaum* case, the returns admitted were Stillman's return for 1944 [Government's Exhibit 35], Segal's return for 1944 [Government's Exhibit 36], and the partnership return of Stillman and Segal for 1944 [Government's Exhibit 37]. It is established that such returns are admissible.

> *U. S. v. Rollnick, et al.*, 91 F. 2d 911 (C. C. A. 2), rev. as to defendant Bernan (302 U. S. 11).

Also see:

> *Steiner v. U. S.*, 134 F. 2d 931 (C. C. A. 5), cert. den. 319 U. S. 774.

A Similar Such Contention With Respect to Returns and Statements Has Been Rather Recently Decided Adverse to Appellants' Contention.

The above contention is based on this Circuit's opinion in the case of *Shubin v. U. S.*, 164 F. 2d 377 (C. C. A. 9).

The *Shubin* case was tried on an indictment that was substantially the same as the instant indictment. It was likewise tried before the Honorable J. F. T. O'Connor; it was a case that preceded, in point of time, the instant case by but a few days. It likewise involved a conspiracy charge to violate the Emergency Price Control Act of 1942, together with the pertinent Maximum Price Regulations pertaining to meat products. The substantive charges in the *Shubin* case were similar to those involved in the instant case.

Appellants in the *Shubin* case raised similar contentions to those now being urged in the instant case, with respect to the introduction of income tax returns and statements which they had voluntarily given to the agents of the Bureau of Internal Revenue. This Circuit held adverse to the contentions there urged and held that the court ruled correctly in admitting such testimony.

In the instant case attention is invited that the witness Segal voluntarily, and not in response to any subpoena, appeared before an agent of the Bureau of Internal Revenue, on or about June 9, 1945, and gave a statement [R. 246]. He was advised that he was not required to make the statement; that he had a right to be represented by an attorney or an accountant, and apparently freely and voluntarily gave such statement [R. 246], in which state-

ment appellant Segal made certain admissions that were utilized in the instant trial.

This statement was Government's Exhibit 33. The testimony of the Internal Revenue Agent Bircher was only given after full and complete authority had been obtained as is required by 26 U. S. C., Sec. 55, and the pertinent regulations under the Treasury decisions.

It should be noted that this testimony, the statement, was limited as to the appellant Segal [R. 302-304].

Internal Revenue Agent Phoebus gave certain testimony concerning conferences that he had had with the appellants, Stillman and Segal [R. 297 through 308]. Government Agent Phoebus likewise had authority for so testifying.

A case to point is:

> *U. S. v. Monjor,* 147 F. 2d 916 (C. C. A. 3), cert. den. 325 U. S. 859.

The *Monjor* case holds that Agents of the Bureau of Internal Revenue may testify if they have authority, and that such procedure is not contrary to the Treasury regulations nor in violation of the Fifth Amendment, where it is established that such statement is voluntary.

Appellants contend that the receipt in evidence of testimony of the admissions so made by the appellants violated the Fifth Amendment by compelling them to testify against themselves, and primarily cite in support of their contention *Counselman v. Hitchcock*, 142 U. S. 547. The *Counselman* case is not at point. In that case the witness had been compelled to appear before a grand jury and there refused to give testimony which might tend to incriminate him, since no immunity was guar-

anteed. An element of *compulsion* was present in the *Counselman* case. Such is not true here. The record clearly shows that the admissions or statements made by both Stillman and Segal were voluntary and were without any element of compulsion. There was no evidence offered to the contrary. Witness Segal seemed to be anxious to adjust his income tax difficulties even though by so doing he admitted violating ceiling prices established by OPA. He admitted the receipt of sizeable sums of money as "side money" [R. 276, 277 and 279]. Apparently appellants were not concerned with their wilful violations of the OPA law and its regulations but were concerned over their possible tax frauds.

Segal was given an appropriate warning and given the right to refuse to speak or to incriminate himself [R. 246].

In this case we find that all of the requirements were met to allow the United States Attorney to use the documents and testimony of the agents, as is called for by the statute, for official use. There was thus compliance with every provision of the law and regulation, and the information and documents of the Internal Revenue Agents were duly made available to the Government in conformance with legal requirements.

There was precedence for this procedure. We believe that it is sufficient to set forth such cases with but brief comment:

Gibson v. U. S., 31 F. 2d 19 (C. C. A. 9), cert. den. 279 U. S. 866;

Greenbaum v. U. S., 113 F. 2d 113, 126 (C. C. A. 9).

Lewy v. U. S., 29 F. 2d 462, 464 (C. C. A. 7), cert. den. 279 U. S. 850;

Lewis v. U. S., 38 F. 2d 406 (C. C. A. 9).

In the *Gibson* case the indictment charged a conspiracy to violate the National Prohibition Act. In support of its case the Government there introduced in evidence, over objection, an affidavit made by the defendant six months after the return of the indictment, and which had been delivered to a Deputy Collector of Internal Revenue with the assurance on the part of the Deputy that it would be considered as only bearing on his income tax obligation.

In admitting the testimony with reference to this affidavit, the court pointed out that the Deputy Collector was incompetent to waive such right and held the same admissible, as is indicated on page 22 of the *Gibson* case.

We have indicated that no compulsion was exercised against either of the appellants. It is the opinion of the appellee that the law governing is not that as designated in the *Counselman* case or the *Monia* case, which last mentioned case also referred to testimony given before a grand jury in obedience to a subpoena; but that the law is governed by principles indicated in cases dealing with the distinction between *admissions* and *confessions* and the admissibility of such testimony under such circumstances.

A case sustaining the introduction of *admissions* made to a police officer after the defendant's arrest, even when the defendant appeared to be nervous and jittery and was under the influence of liquor, and was not even warned that such statements might be used against him and had not been charged with any crime, is the case of

Morton v. U. S., 147 F. 2d 28 (C. A. D. C.), cert. den. 324 U. S. 825.

The *Morton* case clearly recognizes that the rule with regard to the receipt in evidence of admissions is much less onerous than those concerning confessions. After reciting the facts as above noted, the court, on page 31, states as follows:

> "* * * Even a confession, given under such circumstances, would have been admissible. The rules governing the reception in evidence of admissions are much less onerous than those concerning confessions. *There was no reason for an instruction as to the difference between an admission and a confession. That was a question of law, not for the jury, but for the trial judge.* There was no reason for an instruction on what constitutes an involuntary confession, because no confession was offered or received in evidence." (Citing many cases in the footnotes.) (Emphasis added.)

It is thus seen that in the instant case the *admissions* made by appellant Segal, and even the slight admissions made by the appellant Stillman long before the return of this indictment, and made to agents investigating their income tax liabilities, were not in the nature of confessions but were in the nature of admissions; consequently, there was no duty upon the part of the court to have submitted to the jury the instruction as proposed by the appellants, particularly as set forth on pages 89 and 90 of Appellants' Opening Brief.

A reading of the testimony as is reflected in Government's Exhibit 33—the statement of the appellant Segal—will clearly denote that it was not a confession of the crime charged in this indictment; it amounted to attempted explanations of certain moneys he had received as so-called "gifts" from customers paying him sums of money in ad-

dition to the ceiling price on meats sold. It was of a general nature and did not cover any of the specific charges contained in this indictment, this indictment having been filed about nine months later, namely, in March of 1946.

Even though the statements made by appellants Stillman and Segal to the Internal Revenue Agents might be classified as confessions, still, the following authority justifies their introduction.

See:

U. S. v. Bayer, 331 U. S. 532 (particularly on p. 539).

Radovich, one of the appellants who had served with distinction in the Air Forces of the United States Army, was ordered to report to Mitchell Field. He was placed under arrest and confined to the Psychopathic Ward. He was denied callers and communication with others. While under such constraint he made a first confession. This, the Supreme Court held, they would assume was inadmissible. At a later date, Radovich made a second confession to an FBI Agent. At the time of making the second confession he was confined to the Base. He volunteered facts that were not disclosed in the original statement or confession. He was warned that the second statement might be used against him. He requested the original statement —the one that had been taken while he was restricted— and the second one was labeled a supplementary statement and was basically the same as the first. The court permitted the introduction of the second statement although he urged that it was the fruits of the earlier one, and on page 541 of the *Bayer* case stated as follows:

> "* * * The second confession in this case was made six months after the first. The only restraint

> under which Radovich labored was that he could not leave the base limits without permission. Certainly such a limitation on the freedom of one in the Army and subject to military discipline is not enough to make a confession voluntarily given after fair warning invalid as evidence against him. We hold the admission of the confession was not error. *Cf. Lyons v. Oklahoma*, 322 U. S. 596."

The attitude of the Supreme Court with respect to admissions of guilt and the propriety of receiving such in evidence, and the differentiation from the principles announced in the *McNabb* case, is illustrated in the following:

U. S. v. Mitchell, 322 U. S. 65.

In the *Mitchell* case, admissions made immediately after the arrest were held proper and such statements were not nullified, although after making the statements Mitchell was held for eight days before he was arraigned, the court pointing out that the illegality of the detention does not retroactively change the circumstances under which the disclosures were made.

This Circuit has held, subsequent to the *McNabb* and *Anderson* Supreme Court decisions, that testimony is admissible of statements made by the accused to an FBI Agent before any charges had been filed against the accused, where there was no showing of any mistreatment or anything of a negative nature to their being but free and voluntary.

To this effect:

Cohen v. U. S., 144 F. 2d 984 (C. C. A. 9).

This Circuit has also held that there is no presumption against a confession and no burden upon the Government to establish its voluntary character.

To this effect, see:

Gray v. U. S., 9 F. 2d 337 at p. 339 (C. C. A. 9).

"* * * It is the rule in the federal courts that the fact that a confession is made by an accused person even while under arrest or when drawn out by the questions of an officer does not necessarily render it involuntary. There is no presumption against a confession and no burden upon the government to establish its voluntary character. Murphy v. United States (C. C. A.), 285 F. 801, 807; Sparf v. United States, 156 U. S. 51, 55 S. Ct. 273, 39 L. Ed. 343; Perovich v. United States, 205 U. S. 86, 91, 27 S. Ct. 456, 51 L. Ed. 722."

Even where a defendant denies his guilt and he makes exculpatory statements, such statements are admitted as admissions and the cases hereunder noted point out that the rule with regard to reception of admissions is less onerous than those concerning confessions.

To this effect:

Ercoli v. U. S., 131 F. 2d 354 at p. 356 (C. A. D. C.);

Beck v. U. S., 140 F. 2d 169 (C. A. D. C.).

It is therefore submitted that the testimony containing admissions upon the part of appellants was clearly admissible. This testimony, including the statement given by Segal, was not in the nature of confessions but rather that of admissions that had been voluntarily made.

The Disclosure of Admissions and Statements Given to the Bureau of Internal Revenue Was Not Contrary to Any Constitutional Rights of the Appellants.

It should be noted, and there is no contrary evidence, that the statement given by the appellant Segal was free and voluntary. No compulsion was exercised upon him. This testimony was limited as to Segal [R. 302-304].

The cases that counsel cited as noted on page 67 of appellants' brief are not in point. In *Counselman v. Hitchcock,* 142 U. S. 547, the witness had been compelled to appear before a grand jury and there refused to give testimony which might tend to incriminate him, since no immunity was guaranteed. An element of compulsion was present in the *Counselman* case.

In the *Monia case,* 317 U. S. 424, a person testified in obedience to a subpoena. Thus again compulsion existed.

The *Feldman* case gives little support to appellants' contention. That case deals with a mail fraud "kiting" of checks, and the Supreme Court held that the rights of *Feldman* were not violated although testimony he had been compelled to give in a State court was used against him in a Federal prosecution. There was no evidence that Federal Agents had participated in the State proceeding.

In the instant case, when Segal gave his statement which was reduced to writing and which he signed a few days after he had given it [namely, Government's Exhibit 33], or when he or Stillman talked to Internal Revenue Agents, they apparently did so of their own volition.

It has been held that a voluntary extra-judicial admission is admissible notwithstanding that the accused was not warned that his statement might be used against him.

U. S. v. Heitner, 149 F. 2d 105, 107 (C. C. A. 2), cert. den. 326 U. S. 727;

Himmelfarb v. U. S., ... F. 2d ..... (C. C. A. 9) (June 3, 1949).

A case to point is that of

Shapiro v. U. S., 335 U. S. 1.

In the *Shapiro* case and in obedience to an administrative subpoena the accused first produced sales records he was required to keep under "OPA," but when he so appeared he claimed his constitutional privilege. Later, he was prosecuted for violation of the Emergency Price Control Act based upon evidence he so produced. Although the Emergency Price Control Act adopted the immunity provisions of the Compulsory Testimony Act of 1893, the court held that such did not give him immunity from prosecution of making tie-in sales in violation of regulations under the Emergency Price Control Act.

Another interesting point of the *Shapiro* case is the language of the Supreme Court on page 3 thereof, namely, at the very outset the Supreme Court omits utilizing the phrase appellants now so strongly urge should have been inserted in this indictment. namely, "As Amended," when it refers to the Emergency Price Control Act. This is more singular inasmuch as in the *Shapiro* case the Emergency Price Control Act had been amended at least twice prior to the date of the issuance of the subpoena of September 29, 1944, requiring Shapiro to produce the records there involved.

Under separate headings appellants have made similar such objections to the introduction of these returns and the statement given; however, we feel that such contentions are untenable and have been amply answered.

VIII.

No Error Existed With Respect to Exhibit No. 39.

It is our opinion that counsel for appellants is mistaken in the assertion at page 71 of appellants' brief, that Exhibit No. 39 (a book which was ordered withdrawn) remained in evidence or was submitted to the jury. If we recall the transcript—and we believe we do—the correct statement concerning Exhibit No. 39, namely, one of the record books of the Southern California Meat Company, is that it was first marked for identification [R. 293]. Later during the testimony concerning this book certain sheets were abstracted from it and they became Government's Exhibits 39(a), 39(b), and 39(c). These last mentioned sheets from Book 39 were identified and received into evidence [R. 299].

IX.

No Error Existed in the Admission of Exhibits 10 and 11, Testified to by the Witness Samuel Namson.

Exhibit 10 was seven sheets from the "general ledger" of the partnerships operated by the appellants, namely, the Central Packing Company, and Exhibit 11 was four sheets from the same book. Witness Namson testified concerning certain admissions or statements that had been made by Stillman or Segal, or by one or either of them in the presence of each other, when they had talked with him concerning books of the Central Packing Company from which

Government's Exhibits Nos. 10 and 11 were a part. This testimony commences [R. 139] and pertained to certain entries that were not correct and wherein admissions had been made concerning money appellants had accumulated from the sale of meat, from bonuses over and above ceiling prices [R. 143]. It is believed that a reading of the transcript will clearly reflect that sufficient admissions and identification were made by the appellants to Namson, to lay a foundation for the introduction of the exhibits now complained of.

It should be observed that there was no testimony contrary to that given by witness Namson.

X.

Proper Foundations Were Laid for the Admission of All Books and Records Received in Evidence.

Commencing on page 75 of appellants' brief, complaint is made that no proper foundation was laid for the introduction of Exhibits 39(a), 39(b), and 39(c). These books were originally a part of Exhibit No. 39, for identification, a book of the partnership Southern California Meat Company No. 2. This book had been handed to Internal Revenue Agent, the witness Phoebus, when he had talked with Stillman in April of 1945, it having been handed to him in response to his request to look at their books [R. 294, 295 and 297].

It is thus seen that sufficient admissions were made as to the character of the books by one of the persons involved, from which the jury could infer that such books were

books maintained by the partnership of the appellants Stillman and Segal.

Even though the objection concerning lack of foundation, as announced by the "regular entry rule" of 28 U. S. C. A. 695 [1946 Ed.] might apply, it, too, was met in this case.

A like objection under similar circumstances was made to the introduction of books and records in *Ilseng v. U. S.*, 130 F. 2d 823 at p. 826 (C. C. A. 9), cert. den. 314 U. S. 665, wherein the court held there was a sufficient showing to justify their admissibility.

In an analogous situation involving the violation of M. P. R. 169, the court rejected the contention that such books were not kept in the regular course of business.

See, to this effect:

Zimberg v. U. S., 142 F. 2d 132 (C. C. A. 1), cert. den, 323 U. S. 712.

We repeat that all of such exhibits, or books of the partnership concern, were properly identified by direct admissions, and that the objections urged at trial, or presently, go to the weight rather than to the admissibility of such documents.

XI.

No Error Existed in the Instructions Given or in Rejecting Those Urged.

Commencing on page 80 of appellants' brief the contention is now urged that error existed in the instructions given. Here, again, and for several pages we see the complaint that the court read from the Emergency Price Control Act "As Amended," and from R. M. P. R. 169, as "Revised." It is felt that we have heretofore answered these contentions and that there is no merit to this overly nice argument.

Appellants fail to show wherein the instructions read were contrary to the law and regulation in effect as of the dates when the offenses were alleged to have been committed.

On page 81 the appellants assert a rather novel complaint to the effect that the court should not have instructed as to the highest price allowable for the meat in question as of the dates charged. This complaint is particularly unique in that our search of the record fails to reveal that any objection was made to this instruction. We are referring to the instruction reflected on page 362 of the transcript. Furthermore, it will be seen that counsel virtually stipulated to this instruction when he made no objections to what the OPA Price Specialist, Cunningham, would be able to testify to as is reflected [R. 288-291].

No magic lurks in the phrase "As Amended," or "Revised." The court did instruct this jury in accordance with the law and regulations applicable as to the dates involved.

On page 84, appellants complain that the court failed to define what document or record was required to be

kept under the law, the contention being urged that there is nothing in the regulations to define what type of records were required to be kept. Here, again, quibbling is indulged in. Surely no aid would be had in reading more to the jury than is reflected in the regulation itself, namely, that portion of R. M. P. R. No. 169, "SECTION 1364.407—RECORDS AND REPORTS." The court read this portion of the regulation to the jury [R. 368]. Could it have been more specific?

No confusion was had in that at one time the court would refer to the pertinent Act and omit to use the phrase "As Amended," and then at other times insert the phrase "As Amended," in his instructions. We have heretofore pointed out how the Supreme Court itself, in a comparatively recent case and a case which was decided under the Emergency Price Control Act of 1942 (As Amended), did, within the first sentence of that opinion refer to the Act without utilizing the term "As Amended," although at the time in question the Act had been amended at least two times prior to the pertinent dates there involved.

To this effect, see:

Shapiro v. U. S., 335 U. S. 1 at p. 3.

At page 86, appellants endeavor to find consolation in this court's recent opinion of *Samuel, et al. v. U. S.*, 169 F. 2d 787.

As we have heretofore stated, the *Samuel* case is readily distinguishable on the instructions, from the instant case. In fact, the only similarity between the instant case and the *Samuel* case is that they both involved, at least in part, violations of the Emergency Price Control

Act. In passing, it should be noted that even this Circuit in the *Samuel* case, although this Act had been amended prior to the dates of the alleged offense, referred to the Act without utilizing the term "As Amended" (see p. 789 of *Samuel* opinion). The distinguishable feature between this case and the *Samuel* case is that in the instant case no speculation was required in that no objections were even voiced; even the contrary existed by reason of the stipulation, namely, the price permitted to be charged for the meat in question was definitely established by regulation and the court properly so instructed without objection upon the part of appellants. Whereas, in the *Samuel* case, by reason of the type of whisky involved, there was uncertainty as to the maximum price fixed or allowed. This court, on page 792 of its opinion, stated:

> "* * * It was the law that before the whiskey could be sold legally, a maximum price must be fixed. It will be seen that so far as shown none was fixed for the whiskey in suit. The court then gave an erroneous formula for ascertaining the maximum wholesale price for whiskey."

In a summation of its views in the *Samuel* case, a clear distinction is had as will be noted on page 798 thereof.

> "Summarizing our conclusion is: The judgment must be and is reversed because it rests upon a general verdict which may have been found upon the jury's conclusion that a conspiracy existed to violate any one, any two, or all of three United States laws, set up in one count, one of which was erroneously defined to the jury, and such erroneously defined law was so closely connected with both of the other laws in the alleged conspiracy as to affect the decision upon them

to the reversible prejudice of all defendant-appellants."

Another objection that appellants now raise, commencing page 87 of their brief, is the court's instruction that the jury decided the case upon the law effective as of the dates involved, although the Emergency Price Control Act, As Amended, had expired on June 30, 1946. Appellants again contend that the termination of the Act barred prosecution for offenses committed when the Act was in effect. This is obviously an unsound and unwarranted argument and is contrary to the Act itself. 50 U. S. C. App., Sec. 901(b) provides for a savings clause even after the expiration of the Act. Such is also the general law by reason of the Code provision which provides that even the repeal of the statute does not affect existing liabilities unless the repeal expressly so provides.

To this effect:

1 *U. S. C.*, Secs. 29 and 29(a), but now U. S. C., Secs. 109, 110.

There Was No Error in Refusing to Give the Instruction Requested, Concerning the Voluntary or Non-voluntary Character of a Statement Given by One of the Appellants.

On page 89 of appellants' brief, counsel set forth an instruction which the court refused. This instruction concerned whether or not the statement given by Segal to the agents of the Bureau of Internal Revenue was voluntary or not. In view of the record there was no occasion for giving such an instruction.

In the first place there was no testimony to offset the *prima facie* voluntariness of the statement. No one re-

futed the language of the signed statement or the witness who testified to its voluntary character. Furthermore, appellants do not concede that it was a confession; in fact, in many respects it was more in the nature of an exculpatory statement although it did contain certain admissions.

At another point in this brief, commencing page 59 we have endeavored to set forth the law with respect to the distinction between confessions and admissions and feel that such authorities support the position we now urge.

In addition, attention is invited to a recent opinion of this Circuit, namely,

> *Himmelfarb, et al. v. U. S.*, ... F. 2d ..... (C. C. A. 9), June, 1949.

We quote from certain of the opinion as follows:

> "* * * Voluntary admissions, or indeed voluntary confessions, may be received in evidence against the giver without proof of warning."

It seems well established that an admission is admissible in evidence notwithstanding that the accused was not previously warned that his statement would be used against him. To this effect:

> *U. S. v. Heitner,* 149 F. 2d 105 (C. C. A. 2).

The cases relied upon by appellants in support of their position, such as the *Lisenba,* referred to on page 90 of their brief, are instances where a person is in custody previously charged with a crime, or circumstances where there is some conflict as to the voluntary character of the statement received. The contrary was the case here.

A case that is controlling and adverse to appellants' contention is:

Morton v. U. S., 147 F. 2d 28 (C. C. A., D. C.), cert. den. 324 U. S. 875.

It Is Well Settled That Instructions Must Be Taken in Their Entirety.

A reading of the instructions given will illustrate that they amply and fully covered all essential elements involved and fully protected the rights of the appellants. The instruction given with regard to the price allowable for the meat in question is supported by a closely analogous case likewise pertaining to the sale of meat at over-ceiling prices, namely, *Flannagan v. U. S.*, 145 F. 2d 740 (C. C. A. 9).

It is well settled that instructions must be considered in their entirety and that if the entire instructions cover all essential elements, no prejudice results. To this effect see:

U. S. v. Sorcey, 161 F. 2d 899 (C. C. A. 7);

Taylor v. U. S., 142 F. 2d 808 at p. 817 (C. C. A. 9), cert. den. 323 U. S. 723.

To the same effect:

Hargreaves v. U. S., 75 F. 2d 68 at p. 73 (C. C. A. 9), cert. den. 295 U. S. 759.

"It is well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context. Colt v. U. S., 190 F. 305, 308 (C. C. A. 8); Michael v. U. S., 7 F. 2d 865, 866 (C. C. A. 7)."

The rule with respect to instructions is well announced in a rather recent case, namely:

Pine v. U. S., 135 F. 2d 353 at p. 355 (C. C. A. 5), cert. den. 320 U. S. 740.

Even if error occurs in part of the instruction, such error is not reversible, if it is cured by a subsequent charge or by a consideration of the entire charge.

To this effect:

Clarke v. U. S., 132 F. 2d 538 (C. C. A. 9), cert. den. 318 U. S. 789.

The rule is also well settled that when the evidence as a whole is convincing toward the defendant's guilt, reversible error does not necessarily occur from an erroneous instruction. To this effect:

Roubay v. U. S., 115 F. 2d 49 (C. C. A. 9).

Conclusion.

It is respectfully submitted that there was substantial evidence supporting the verdict of guilty, of the appellants, on the counts of which they were found guilty.

No error of a reversible nature occurred at the trial.

In view of the foregoing, and in view of the contentions urged in this, Appellee's Reply Brief, it is respectfully submitted that the verdict and judgment as to both of the appellants should be affirmed.

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APPENDIX.

Maximum Price Regulations Nos. 148, 169 and 239 are price regulations issued pursuant to the Emergency Price Control Act of 1942.

Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts. Maximum Price Regulation No. 148 deals with dressed hogs and wholesale pork cuts. Maximum Price Regulation No. 239 deals with lamb and mutton carcasses and wholesale cuts.

Revised Maximum Price Regulation No. 169 in part provides (7 Fed. Reg. 10381, as amended, issued December 10, 1942, effective December 16, 1942):

> "Section 1364.406. Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: * * *"
>
> "Section 1364.407—Records and Reports. * * *
>
> "(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for

inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and the weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor. * * *"

"Section 1364.401. Prohibition against selling beef and veal carcasses and whole cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive [33] any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. * * *"

There are in effect substantially similar provisions in Revised Maximum Price Regulations 148 as to pork, and 239 as to lamb, except that under Revised Maximum Price Regulation 148 there is no evasion provision such as above, and the record keeping provision is in different terms. The substance of the regulation is that certain records must be kept including such as are involved in this case and that they must be truthful and cannot be wilfully made false.